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Nos. 84-1634 and 85-170

Supreme Court of the United States Supreme Court, U.S.
FILED

October Term, 1984

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CUYAHOGA VALLEY RAILWAY COMPANY,
Petitioner,

JOSEPH F. SPANIOL, JR.
CLERK

vs.

UNITED TRANSPORTATION UNION

and

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION,
Respondents.

No. 84-1634

WILLIAM E. BROCK, SECRETARY OF LABOR,
Petitioner,

vs.

UNITED TRANSPORTATION UNION

and

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION,
Respondents.

No. 85-170

**BRIEF OF RESPONDENT, UNITED TRANSPORTA-
TION UNION, IN OPPOSITION TO THE PETITIONS
FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE
SIXTH CIRCUIT**

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PARTIES TO THIS PROCEEDING

Cuyahoga Valley Railway Company was the petitioner in the Court of Appeals in Case No. 82-3773. The Secretary of Labor was the petitioner in the Court of Appeals in Case No. 82-3771. The respondents in both cases were the United Transportation Union and the Occupational Safety and Health Review Commission. The cases were consolidated for review by the Court of Appeals.

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STATEMENT OF THE CASE

This matter involves separate Petitions for a Writ of Certiorari directed to the United States Court of Appeals

for the Sixth Circuit. One filed by the Cuyahoga Valley Railway Company and the other by William E. Brock, Secretary of Labor. Inasmuch as the issues and the respondents are the same, the cases were consolidated for review below. This response is, therefore, directed to both Petitions.

In the interest of brevity, respondent, United Transportation Union (hereinafter the "Union"), will not submit a separate statement of the case. The Union does, however, want to clarify one portion of the statement submitted by petitioner, Cuyahoga Valley Railway Company. At the hearing before Administrative Law Judge Erwin L. Stuller, the Union objected to the decision of the Secretary of Labor (hereinafter the "Secretary") to withdraw its citation against the Cuyahoga Valley Railway Company (hereinafter "Cuyahoga Valley Railroad") because the Union believed the working condition involved was not covered by the Federal Railroad Administration. At that time Judge Stuller took the case under advisement and stated that if the Union wanted to submit something in writing, it would be made part of the record. Judge Stuller did not, however, specify any time requirement for the Union to file its written objections.

Within one week an attorney representing the Union wrote Judge Stuller that unless advised to the contrary, the Union would file a brief at the earliest possible date. Judge Stuller, however, vacated the Secretary's citation without any further notification to the parties and without considering the Union's objections which were set forth in a brief that Judge Stuller received one day after the date of his written order vacating the Secretary's citation.

SUMMARY OF ARGUMENT

The decision of the Court of Appeals below to affirm the decision of the Occupational Safety and Health Review Commission (hereinafter the "Commission") to set aside the order of the Administrative Law Judge and remand the case for hearing on the Union's objections to the withdrawal of the Secretary's citation is correct. Under the particular facts of this case, wherein the Secretary filed a formal complaint and Cuyahoga Valley Railroad filed an answer; and wherein the Union had elected party status, the Secretary's role as prosecutor becomes more limited and the Commission's role as the adjudicative body takes over. It was, therefore, not violative of the terms of the Occupational Safety and Health Act (hereinafter the "Act") or its legislative history for the Commission to remand this case so that the Union may have the merits of its objections heard.

Furthermore, the decision of the Court below to permit the Union to do more than merely challenge the reasonableness of abatement periods is correct. The Act requires the Secretary to prescribe procedural rules for employees or their representatives to participate as parties. The decision of the Court below merely refuses to give the term "parties" an unreasonably restrictive interpretation. The decision of the Court of Appeals follows the spirit and overall intent of the Act, which is to insure that dangerous and hazardous working conditions are remedied so that employees have a safe, hazard-free environment wherein to work.

ARGUMENT

I. The Secretary Of Labor's Role As Prosecutor Of Occupational Safety And Health Act Violations Becomes Limited Once The Adjudication Process Begins Under The Jurisdiction Of The Occupational Safety And Health Review Commission.

The Court of Appeals below carefully and correctly distinguished between the roles of the Secretary and the Commission in cases such as this case which involves a citation and notice of contest, followed by issuance of a complaint by the Secretary, answer by the employer and election of party status by the Union and one where a settlement is reached or citation vacated prior to the filing of a complaint and answer. See *Marshall and IMC Chemical Group v. OSHRC*, 635 F.2d 544 (6th Cir. 1980). The Court below recognized that in such a case as this the adversarial process was well advanced and, as such, the Commission as an adjudicative body, had control of the case and, therefore, authority as well to review the Secretary's decision to withdraw the citation. *Donovan v. United Transportation Union*, 748 F.2d 340, 343 (6th Cir. 1984).

Since the decision below the Commission itself has adopted a new position prohibiting an employee or employees' representative from objecting to withdrawal of a citation in all cases. See *American Bakeries Co.*, Empl. Safety & Health Guide, ¶26,951 (1984); *Copperweld Steel Co.*, Empl. Safety & Health Guide, ¶26,956 (1984). This new position, however, is not based on a sound, well grounded change in the legal reasoning and interpretation the Commission utilized in its prior decisions, but rather is a natural, albeit unfortunate reaction by the Commis-

sion to the number of court decisions against it. Nowhere in either *American Bakeries* or *Copperweld Steel* does the Commission perform the type of cogent analyzation of the Act and the purposes of the Act that is found in the decision below and the deference granted to these two recent decisions should, therefore, be tempered in kind. As such, the decision below remains correct and should stand.

II. Once An Employee Or His Authorized Representative Has Elected Party Status Under the Occupational Safety And Health Act, His Right To Challenge A Citation Is Not Limited Only To The Reasonableness Of The Time Fixed For Abatement Of The Violation.

The issue of the role employees or their representatives may play in the enforcement of citations revolves around an interpretation of §10(C) of the Act and Rule 20(a) of the Commission's Rules of Procedure. The interpretations of the Section of the Act and the Commission's rule have been the subject of much discussion by the Commission and the courts.

Over the years the Commission has taken the view that employee representatives can object to more than just the reasonableness of the period set for abatement of a cited violation. The Commission's position on this issue is exhaustively set forth in *Mobil Oil Corporation*, 10 OSHC (BNA) 1905, rev., 713 F.2d 918 (2nd Cir. 1983).

As the petitioners pointed out, the Commission has reversed its decision in *Pan American World Airways*, Empl. Safety & Health Guide (CCH), ¶26,920 (1984) and now states that employees and their representatives are limited to objecting to the reasonableness of the abatement period. However, once again the Commission's decision is not based

on a review and rethinking of the reasoning upon which their former position was grounded. Rather the new position is a reaction and response to a string of decisions of Courts of Appeal which have reached a more restrictive interpretation of the Act as it relates to the participation of employees and their representatives.

The Court below, as did the Commission formerly, interpreted the legislative history of the Act with the underpinnings of legislative purpose and intent. It arrived at a decision correctly permitting employees a meaningful role as participants when they elect to participate as parties to proceedings under the Act. The decision of the Court below violated neither the spirit nor purpose of the Act, but instead supported it and for that reason should stand.

CONCLUSION

For the foregoing reasons, both Petitions for a Writ of Certiorari should be denied.

Respectfully submitted,

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EDITOR'S NOTE

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SUPREME COURT OF THE UNITED STATES

CUYAHOGA VALLEY RAILWAY COMPANY
84-1634 v.
UNITED TRANSPORTATION UNION ET AL.

WILLIAM E. BROCK, SECRETARY OF LABOR
85-170 v.
UNITED TRANSPORTATION UNION ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 84-1634 AND 85-170. Decided November 4, 1985

PER CURIAM.

The Secretary of Labor is authorized to inspect work sites to uncover noncompliance with the Occupational Safety and Health Act. 29 U. S. C. § 657(a). If, as a result of such an inspection, the Secretary discovers a violation of the Act, he is authorized to issue a citation to the employer fixing a reasonable time for the abatement of the violation, § 658(a), and assessing a penalty for the violation. § 666. The employer then has 15 days in which to contest the citation. § 659(a). Similarly, employees have 15 days in which to challenge as unreasonable "the period of time fixed in the citation for the abatement of the violation." § 659(c). See generally *Whirlpool Corp. v. Marshall*, 445 U. S. 1, 9, n. 11 (1980). The statute and rules of the Occupational Safety and Health Review Commission also permit affected employees to participate as parties in any hearing in which the employer contests the citation. 29 U. S. C. § 659(c), 29 CFR § 2200.20(a) (1985).

If an employer contests the citation, and the Secretary intends to seek its enforcement, the Secretary must file a complaint with the Commission within 20 days, and the employer must file an answer within 15 days. 29 CFR § 2200.33 (1985). Once these pleadings are filed, a hearing to deter-

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mine the validity of the citation will be held before an Administrative Law Judge, with discretionary review by the Commission. 29 U. S. C. §§ 659(c), § 661(j).

In the present case, the Secretary cited Cuyahoga Valley Railway Company for a violation of the Act. Cuyahoga contested the citation, the Secretary filed a complaint with a Commission, and Cuyahoga filed an answer. Respondent United Transportation Union, which represents Cuyahoga employees, properly moved to intervene in the proceedings. At the hearing, however, the Secretary moved to vacate the citation on the ground that the Federal Railway Administration, not the Secretary, had jurisdiction over the relevant safety conditions. Despite the Union's objection, the ALJ granted the Secretary's motion and vacated the citation. Thereafter, the Commission directed review of the ALJ's order. The Secretary promptly objected to this action, asserting that part of the citation involved matters beyond the reach of the Act and that additional portions of the citation did not warrant litigation because of the state of the evidence. He also stated that the record before the Commission was inadequate to resolve the issue posed.¹ Some six years later, the Commission rejected this submission and remanded the case to the ALJ for consideration of the union's objections.

¹ Vacating the citation thus did not rest solely on jurisdictional grounds. Nor did the Court of Appeals' decision sustaining the Commission's order focus on jurisdiction. Its holding would permit review by the Commission of the Secretary's withdrawal of any citation, whatever the reason, provided the adversarial process was sufficiently advanced to vest control in the Commission. For these reasons and because the issue relates to the statutory division of authority between the Secretary and the Commission, rather than the question of judicial review of administrative action, the case does not pose the question whether an agency's decision, resting on jurisdictional concerns, not to take enforcement action is presumptively immune from judicial review under § 701(a)(2) of the Administrative Procedure Act. See *Heckler v. Chaney*, — U. S. —, —, n. 4 (1985).

The Court of Appeals for the Sixth Circuit affirmed the Commission's holding that it could review the Secretary's decision to withdraw a citation. *Donovan v. United Transportation Union*, 748 F. 2d 340 (CA6 1984). The court recognized that the Secretary "has the sole authority to determine whether to prosecute" a violation of the Act. 748 F. 2d, at 343. Here, however, the court found that the Secretary "had already made the decision to prosecute by filing a complaint and that complaint had been answered at the time the Secretary attempted to withdraw the citation." *Ibid.* Because the "adversarial process was well-advanced at the time the Secretary attempted to withdraw the citation," the court reasoned that the Commission, "as the adjudicative body, had control of the case and the authority to review the Secretary's withdrawal of the citation." *Ibid.*¹

Contrary to the Sixth Circuit's decision, eight other courts of appeals have held that the Secretary has unreviewable discretion to withdraw a citation charging an employer with violating the Occupational Health and Safety Act. *Donovan v. Allied Industrial Workers (Midland)*, 760 F. 2d 783, 785 (CA7 1985); *Donovan v. Local 962, International Chemical Workers Union (Englehard)*, 748 F. 2d 1470, 1473 (CA11, 1984); *Donovan v. International Union, Allied Industrial Workers (Whirlpool)*, 722 F. 2d 1415, 1422 (CA8 1983); *Donovan v. United Steelworkers of America (Monsanto)*, 722 F. 2d 1158, 1160 (CA4 1983); *Donovan v. Oil, Chemical and Atomic Workers International (American Petrofina)*, 718 F. 2d 1341, 1352-1353 (CA5 1983), cert. denied, — U. S. — (1984); *Donovan v. Occupational Safety and Health Review Commission (Mobil Oil)*, 713 F. 2d 918, 926-927 (CA2 1983);

¹The Court of Appeals also relied to some extent on the position of the Commission as to the scope of its powers. The Commission, however, has since revised its view and now declines to review the Secretary's dismissal of a citation. *Pan American World Airways, Inc.*, 1984 O. S. H. Dec. (CCH) ¶26,920; *American Bakeries Co.*, 1984 O. S. H. Dec. ¶26,951; *Copperweld Steel Co.*, 1984 O. S. H. Dec. ¶26,956.

Oil, Chemical and Atomic Workers International v. Occupational Safety and Health Commission (American Cynamid), 671 F. 2d 643, 650-651 (CA6), cert. denied, 459 U. S. 905 (1982); *Marshall v. Sun Petroleum Products Co.*, 622 F. 2d 1176, 1187 (CA3), cert. denied, 449 U. S. 1061 (1980). We agree with the decisions of these courts.

It is apparent that the Court of Appeals' decision is inconsistent with the detailed statutory scheme which contemplates that the rights created by the Act are to be protected by the Secretary. See *Atlas Roofing Co. v. Occupational Safety and Health Commission*, 430 U. S. 442, 444-447 (1977); *Mobil Oil*, *supra*, 713 F. 2d, at 927; *Sun Petroleum Products*, *supra*, 622 F. 2d, at 1187. It is also clear that enforcement of the Act is the sole responsibility of the Secretary. *Oil, Chemical and Atomic Workers International v. Occupational Safety and Health Commission*, *supra*, 671 F. 2d, at 649. It is the Secretary, not the Commission, who sets the substantive standards for the work place, and only the Secretary has the authority to determine if a citation should be issued to an employer for unsafe working conditions, 29 U. S. C. § 658. A necessary adjunct of that power is the authority to withdraw a citation and enter into settlement discussions with the employer. *Whirlpool*, *supra*, 722 F. 2d, at 1420; *Mobil Oil*, *supra*, 713 F. 2d, at 927. The Commission's function is to act as a neutral arbiter and determine whether the Secretary's citations should be enforced over employee or union objections. Its authority plainly does not extend to overturning the Secretary's decision not to issue or to withdraw a citation.

The Sixth Circuit's conclusion that the Commission can review the Secretary's decision to withdraw a citation would discourage the Secretary from seeking voluntary settlements with employers in violation of the Act, thus unduly hampering the enforcement of the Act. *Whirlpool*, *supra*, 722 F. 2d, at 1420; *Mobil Oil*, *supra*, 713 F. 2d, at 927. Such a procedure would also allow the Commission to make both pros-

ecutorial decisions and to serve as the adjudicator of the dispute, a commingling of roles that Congress did not intend. *Whirlpool, supra*, 722 F. 2d, at 1419; *Mobil Oil, supra*, 713 F. 2d, at 930-931; *Sun Petroleum Products, supra*, 622 F. 2d, at 1187. Indeed, the Commission itself was created to avoid giving the Secretary both prosecutorial and adjudicatory powers. See generally Staff of the Senate Comm. on Labor and Public Welfare, 92d Cong., 1st Sess., Legislative History of the Occupational Safety and Health Act of 1970 (S. 2193, Pub. L. No. 91-596) (Comm. Print 1971). Accord *Whirlpool, supra*, 722 F. 2d, at 1419; *Mobil Oil, supra*, 713 F. 2d, at 930-931, and n. 21. The other courts of appeals to address this problem have recognized the distinct roles of the Secretary and the Commission and accordingly have acknowledged that the Secretary's decision to withdraw a citation against an employer of the Act is not reviewable by the Commission. Based on these considerations, the petitions for certiorari are granted and the judgment of the Court of Appeals is

Reversed.

JUSTICE BRENNAN and JUSTICE BLACKMUN dissent from summary disposition. They would grant certiorari and set the cases for oral argument.

JUSTICE MARSHALL dissents from this summary disposition, which has been ordered without affording the parties prior notice or an opportunity to file briefs on the merits. See *Maggio v. Fulford*, 462 U. S. 111, 120-121 (1983) (MARSHALL, J., dissenting); *Wyrick v. Fields*, 459 U. S. 41, 51-52 (1982) (MARSHALL, J., dissenting).